Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

October Term, 1999

COUNTY OF ARMSTRONG, JACK DUNMIRE, ROBERT A. CINPINSKI, AND JAMES SCAHILL, INDIVIDUALLY AND AS COMMISSIONERS ON THE BOARD OF COMMISSIONERS OF THE COUNTY OF ARMSTRONG,

Petitioners

vs.

JANICE M. CLARK,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. IN LIGHT OF THE DECISION OF THE UNITED STATES SUPREME COURT IN BOGAN v. SCOTT-HARRIS, (DECIDED AFTER THE JURY VERDICT IN THIS CASE), SHOULD PETITIONERS' RULE 50 MOTION TO DISMISS INDIVIDUAL DEFENDANTS (WHO ARE ELECTED COUNTY COMMISSIONERS) AS TO PERSONAL LIABILITY AND LIABILITY FOR PUNITIVE DAMAGES HAVE BEEN GRANTED AND THE INDIVIDUAL DEFENDANTS DISMISSED?

II. WERE THE PETITIONERS UNFAIRLY PREJUDICED WHEN THE TRIAL COURT DENIED PETITIONERS' MOTION IN LIMINE AND OVERRULED PETITIONERS' OBJECTIONS AT TRIAL PURSUANT TO RULE 403, AND ADMITTED TESTIMONY REGARDING ALLEGATIONS OF SEXUAL HARASSMENT BY A MALE SUPERVISOR AGAINST ANOTHER EMPLOYEE WHICH OCCURRED PRIOR TO TWO OF THE NAMED DEFENDANTS BEING ELECTED AS COUNTY COMMISSIONERS, WHICH ALLEGATIONS WERE NEVER THE SUBJECT OF A CHARGE OF DISCRIMINATION AND THE TRUTH OF WHICH THE TRIAL COURT ADVISED THE JURY WAS NOT AT ISSUE?

III. WAS IT ERROR FOR THE TRIAL COURT TO PERMIT A JURY VERDICT IN AN EMPLOYMENT DISCRIMINATION CASE, WHICH AWARD INCLUDED DAMAGES FOR EMOTIONAL DISTRESS, WHEN PLAINTIFF'S MEDICAL EXPERT DID NOT ATTRIBUTE EMOTIONAL DISTRESS TO CONDUCT OF ANY OF THE DEFENDANTS?

IV. IF A PLAINTIFF IN AN EMPLOYMENT DISCRIMINATION CASE TESTIFIES THAT ON THE DATE OF HER SUSPENSION SHE BELIEVED THAT DISCRIMINATION OCCURRED BUT SHE DOES NOT FILE A COMPLAINT OF DISCRIMINATION WITH THE PENNSYLVANIA

HUMAN RELATIONS COMMISSION WITHIN ONE HNDRED EIGHTY DAYS AND DOES NOT FILE A CHARGE OF DISCRIMINATION WITH EEOC UNDER TITLE VII FOR MORE THAN THREE HUNDRED DAYS, AND AFTER HER TERMINATION DOES NOT FILE A CHARGE ALLEGING THAT THE TERMINATION WAS DISCRIMINATORY BUT ONLY THAT THE TERMINATION WAS RETALIATORY, SHOULD THE TITLE VII AND PHRA ACTIONS BE DISMISSED AS UNTIMELY?

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The opinion of the United States Court of Appeals for the Third Circuit, which is unreported, is set forth in the Appendix followed by the denial of petition for rehearing by the panel and suggestion for rehearing en banc.

STATEMENT OF BASIS OF JURISDICTION

The statutory provision for this Court's Jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals issued its decision in this case on July 14, 1999. Panel rehearing and suggestion for rehearing en banc were timely requested. Rehearing was denied on August 12, 1999. This Petition was timely filed within ninety days of the denial of panel rehearing as provided in Rule 29. The action in the District Court was brought alleging federal and state statutory claims and state law tort claims against the Defendants. In three separate counts, the Plaintiff alleged violations of 42 U.S.C. §1983, Title VII of the Civil Rights Act of 1964 as amended 42 U.S.C. §2000(e), and the Pennsylvania Human Relations Act 43 P.S. §951 et seq. and claims for emotional and distress. The District Court exercised subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Federal Statutes

42 U.S.C. Section 1983

> Every person who, under color of any statute, ordinance regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the Jurisdiction thereof to the deprivation of any rights privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Section 2000e-5(e)(1)

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in the case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a state or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, which ever is earlier, and a copy of such charge ,shall be filed by the Commission with the State or local agency.

Pennsylvania Statute

Pennsylvania Human Relations Act, 43 P. S. Section
951 et seq. (PHRA)
43 Purdon's Statutes, Section 959 (h)

Any complaint filed pursuant to this section must be so filed within one hundred eighty days after the alleged act of discrimination, unless otherwise required by the Fair Housing Act.

STATEMENT OF THE CASE

This matter arises out of the suspension of the Plaintiff by the Petitioner Armstrong County on August 19, 1993. Plaintiff Janice Clark was at the time the Director of the Tax Claim Bureau of the County of Armstrong. On or about August 6, 1993, an attorney representing a taxpayer reported to Ms. Clark the property for which taxes had been paid was nonetheless listed in the most recent advertisement for tax sale for unpaid taxes. Ms. Clark reported this to Commissioner Robert A. Cinpinski on August 11, 1993. The matter as further investigated by the County detective and the in the course of the investigation it was reported to this detective that Ms. Clark had attempted to balance an unauthorized cash fund kept in her office, known as the Tax Lien Certificate Fund. On August 19, 1993 Ms. Clark was suspended from her position as Tax Claim Director. Ultimately, the State Police investigated the matter and arrested a clerk supervised by Ms. Clark and charged her with various theft crimes for which she was later convicted. On November 6, 1994 Ms. Clark's employment with Armstrong County was terminated. Thereafter on August 16, 1995, Ms. Clark filed a Civil Action at No. 95-1321 in the Western District of Pennsylvania alleging deprivation of liberty interest and sex discrimination in violation of 42 U.S. §1983, sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e) et seq. and sex discrimination in violation of the Pennsylvania Human Relations Act, 43 P.S. §951 et seq.

Judgment Order of January 30, 1998. Defendants filed a Motion for Judgment as a Matter of Law or in the Alternative a Motion for a New Trial, which was denied by District Court on February 20, 1998. On February 27, 1998 Defendants filed a Notice of Appeal to the Third Circuit.

Count I of the Complaint alleged violations of 42 U.S. §1983, Count II alleged violation of Title VII of the Civil Rights Act of 1964 as amended 42 U.S.C. §2000(e) et seq., Count III alleged violations of the Pennsylvania Human Relations Act 43 P.S. §951 et seq. as well as claims for emotional distress. The Plaintiff was suspended by Defendant Armstrong County on August 19, 1993 be-

cause of her failure to properly administer the tax lien certificate fund. This had been discovered during an investigation of an unrelated matter involving the failure to properly credit tax payments accepted by the Armstrong County Tax Claim Office of which the Plaintiff was the Director. That investigation was commenced by the Armstrong County District Attorney's Office detective. Eventually that investigation was turned over to the Pennsylvania State Police who concluded their initial investigation in August, 1994 and arrested a clerk in the Tax Claim Office. The Clerk had been supervised by the Plaintiff, who testified that although she initially suspected the clerk she never told the Commissioners of her suspicions and did not tell the State Police Investigator for many months.

Only after the initial arrest the did the Plaintiff make her initial request to be reinstated, in September, 1994. By letter of October 19, 1994 from Defendant's counsel to Plaintiff's counsel, the Plaintiff was advised that a hearing would be conducted on October 25, 1994, or at such time as was convenient for the Plaintiff and her counsel, to determine her employment status. On October 17, 1994, Plaintiff then filed an EEOC charge which was mailed to Defendants on October 20, 1994 alleging that the Defendants violated Title VII of the Civil Rights Acts of 1964 by failing to reinstate the Plaintiff. The hearing for the Plaintiff was scheduled for October 25, 1994 which the Plaintiff refused to attend. Plaintiff had previously received a detailed description of the issues which the Commissioners were to consider in reviewing her employment status. She was offered the opportunity to present any relevant information which she believed the Commissioners should consider but she declined the opportunity for a hearing.

Thereafter, the Plaintiff was terminated on November 3, 1994 for failure to properly administer the tax lien certificate and mismanagement. At the time of her termination, the Defendants specifically denied that such termination was related to any criminal activity or suspicion of criminal conduct by the Plaintiff. Thereafter the Plaintiff was notified in writing of her termination and the reasons therefore.

Thereafter the Plaintiff filed a charge of retaliation with the

EEOC alleging that her termination was in retaliation for the charge which she filed on October 17, 1994. The Plaintiff never filed any charged with the EEOC alleging that her termination of November 3, 1994 otherwise violated Title VII. Therefore, neither the charge filed on October 17, 1994 nor the later filed charge ever alleged that her suspension violated Title VII nor that her termination violated Title VII. The two charges alleged that the Defendant violated a "duty" to reinstate the Plaintiff in September, 1994 and that the Defendants retaliated against the Plaintiff.

Although the clerk arrested in September, 1994 continued to steal money from the Tax Claim Office after the Plaintiff's suspension, the Board of Commissioners were unaware of such thefts at the time and no witness testified as to the contrary. The thefts were not discovered until after January, 1995 and were the result of cooperation between the Pennsylvania State Police, County Controller Darlene Pike and acting Tax Claim Director William Brueggeman. The Board of Commissioners in office at the time that Clark was suspended and terminated, Dunmire, Cinpinski and Scahill were not aware of these additional thefts by Anthony and were thus unable to take action against Bruggeman who then supervised Anthony. Bruggeman retired in June, 1996. The Plaintiff never informed the Board of Commissioners of any alleged management errors by acting Tax Claim Director William Brueggeman.

After the close of discovery, Defendants filed a Summary Judgment Motion which was granted as to Plaintiff's claims for deprivation of a liberty interest. Thereafter, the matter proceeded to trial on the remaining Counts of the Complaint. The trial commenced on January 21, 1998 and concluded on January 28, 1998 with a verdict in favor of the Plaintiff for $425,000 against all defendants and $25,000 punitive damages against each individual defendant.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT DENIED THE DEFENDANTS' RULE 50 MOTION TO DISMISS THE INDIVIDUALLY NAMED DEFENDANTS.

In reliance on *Baker v. Monroe Township*, 50 F.3d 1186 (3rd Cir. 1995), the Trial Court refused to dismiss the action as to the individual Commissioners. In Baker, the Third Circuit said that Plaintiffs in a §1983 action must show direct participation by individual Defendants to violate their rights in order to recover against individual Defendants. The Court required that Plaintiffs show that a policymaker authorize policies that led to violations or permitted practices that led to violations. 50 F.2d at 1190-1191. The United States Supreme Court in *Bogan v. Scott-Harris*, 523 U.S. ____, 140 L.Ed 2d 79, 118 S. Ct. 966 (1998) held that individual elected officials are absolutely immune to §1983 actions when the complained of conduct is in the nature of legislative action.

In *Bogan*, the Defendant elected officials eliminated a one person department in which the Plaintiff was the only incumbent employee. The Supreme Court found this to be legislative action and therefore found the elected officials immune to §1983 liability. The Petitoners submit that there is no analytical difference between the circumstances of *Bogan* and the circumstances of the instant matter as to the individual liability of the elected officials for compensatory or punitive damages. In *Bogan* and here, elected officials, in their capacities as elected officials, voted and the result in each instance was that the Plaintiff was terminated. County Commissioners in Pennsylvania are the executive and legislative authority for County Government. 16 P.S. 501, 509. In the instant matter, there was no evidence that the individual Defendants ever acted outside of their role as County Commissioners and even the Trial Court initially agreed with Defendants that there was no basis for individual liability. The Plaintiff did not address individual and official capacity in her proposed jury instructions. In the instant matter, liability has been imposed for a decision that was no more than the exercise that by the County Commissioners of their duty to supervise and manage County Government. The Plaintiff reported directly to the

Board of Commissioners. If this Board of Commissioners had voted to eliminate the Tax Claim Bureau, which is not a statutorily required entity, they would have been in no different position than the Defendants in Bogan and presumably would therefore have been immune from any §1983 individual liability for compensatory and punitive damages. This does not prevent the Plaintiff from recovering if there is discrimination because the Plaintiff may recover against a Municipality if the policymakers enact a policy which results in a deprivation of the Plaintiff's right. In the instant matter, the Plaintiff's recovery is no more and no less as to the compensatory damages, whether or not the individual Commissioners are subject to liability or not.

As the Commissioner should have been dismissed individually, there would have been no opportunity for punitive damages. Further, for all the reasons and analysis of *Bogan*, the individual Defendants in the instant matter should not be subject to liability for either compensatory or punitive damages.

This issue of individual liability for §1983 damages is particularly significant because the Verdict Slip did not require the jury to distinguish §1983 intentional discrimination from other liability. In the absence of a specific finding of intent there should be no §1983 liability. This is important in this case when the Title VII and P.H.R.A. claims should have been dismissed as untimely.

The jury was permitted to decide whether the individual Defendants acted willfully, deliberately, maliciously or with reckless disregard for the rights of the Plaintiff However, the record is devoid of any conduct for which any individual Commissioners could be found to have willfully, deliberately, maliciously or recklessly disregarded the rights of the Plaintiff. The Commissioners offered the Plaintiff a hearing before any final decision. The Plaintiff declined the hearing and issued an ultimatum to the Commissioners to reinstate her with back pay. The Commissioners sought to protect the rights of the Plaintiff, not to deprive her of rights. Therefore, the jury should not have been permitted to award punitive damages.

II. THE PETITIONERS WERE UNFAIRLY PREJUDICED WHEN THE TRIAL COURT PERMITTED TESTIMONY REGARDING ALLEGATIONS OF SEXUAL HARASSMENT BY A MALE SUPERVISOR TOWARDS A FEMALE EMPLOYEE OTHER THAN THE PLAINTIFF WHICH ALLEGED CONDUCT WAS ALWAYS DENIED BY THE SUPERVISOR, WAS NEVER THE SUBJECT OF ANY CHARGE OR COMPLAINT OF DISCRIMINATION AND WHICH OCCURRED BEFORE TWO OF THE NAMED DEFENDANTS WERE IN OFFICE AS COMMISSIONER.

Federal Rule of Evidence 403 provides that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion or waste of time. In the instant matter the Defendants sought to exclude any testimony regarding a former employee of Armstrong County named Paul Simon specifically on the basis of Rule 403 Trial Courts should conduct a balancing test when evidence is sought to be excluded pursuant to Rule 403. *Glass v. Philadelphia Electric Company*, 34 F.3d 188, 191-192 (3rd. Cir. 1994). In the instant matter, the District Court did not conduct a balancing test, but rather the Court ignored any prejudicial effect of testimony regarding Simon. The prejudice against the Defendants as best illustrated by the Trial Judge's statement that it did not matter whether or not the allegations of misconduct by Simon were true. Further, Federal Rule of Evidence 401 defines "relevant evidence" to mean evidence having any tendency to make the existence of any fact of consequent to the determination of the action more probable or less probable. In the instant matter, there was no relevance of allegations of Simon's misconduct to the determination of the Defendants with regard to the Plaintiff. The Plaintiff supervised a much larger department than Simon and the problems which existed in the office as supervised by the Plaintiff resulted in a loss of thousands of dollars to Armstrong County which was not the case with Simon. In addition, the problems associated with Clark's supervision of Anthony might have resulted in the tax sale of land on which taxes had already been paid, which sale would threaten the integrity of County Government process. By contrast, allegations of Simon's misconduct including allegations of sexual

harassment, did not involve loss of money and did not threaten to undermine County Government processes. Some of the alleged misconduct occurred outside of the workplace and much of alleged misconduct pre-dated Defendants Dunmire and Scahill becoming Commissioners of Armstrong County and finally Simon suffered a stroke in June, 1992. The Plaintiff was clearly not similarly situated to Simon. The Trial Judge opined that whether or not Simon actually engaged in the misconduct was not the issue and initially held that any rebuttal testimony by Mr. Simon would be inadmissible. Counsel for Defendants specifically cited Rule 403 as the basis to exclude testimony regarding Simon. The prejudice against Defendants was best illustrated by the Trial Judge statement:

> "I can make it clear to the jury that it doesn't matter whether he did it or not. The issue has nothing to do with whether or not the sexual harassment occurred."

The veracity of these allegations is the key to relevance. It was prejudicial to permit the jury to hear extensive of examination of Defendant Cinpinski with regard to Paul Simon when the Judge said to the jury "and as to the truth of the allegations, those are not at issue." This extensive examination of hearsay testimony made it appear as if the allegations, despite the Judge's statements, were nonetheless true and therefore made it appear that allegations of sexual harassment were ignored by the Defendants even though always denied by Simon. This was particularly prejudicial to Defendants Scahill and Dunmire who were not Commissioners when the allegations of sexual harassment were made. Additionally, these allegations of sexual harassment never led to a charge of discrimination nor any type of civil action being filed by Simon's accuser. It is confusing to permit the Plaintiff to offer extended recitation of these allegations when the Trial Court tells the jury there is no issue of veracity.

The testimony and other evidence regarding Simon should have been excluded for three reasons. First, all of the testimony regarding Simon and all of the evidence regarding Simon was hearsay which should have been excluded pursuant to Federal Rules of Evidence 802 and 805, as the Defendants did not have an opportunity to cross-

examine the makers nor even identify the makers of many of the statements that were offered. Second, the evidence regarding Simon was not relevant because Simon was not in a similar position to the Plaintiff nor did his misconduct much of which he denied, involved loss of money to the Defendant Armstrong County nor did it involve any threats to the integrity of any County government functions. Third, Simon's circumstances after June, 1992 are not analogous to the Plaintiff. Simon suffered a stroke in June, 1992 and all of the actions by the Commissioners after that date were affected by Simon's disability.

Even if relevant to the instant matter, Federal Rule of Evidence 403 provides that extremely prejudicial evidence may be excluded. In the instant matter, the prejudicial effect of the testimony regarding Simon is obvious and is magnified by the marginal, at best, relevance. Moreover, confusion necessarily follows if the Trial Court tells the jury that it is of no consequence whether or not proffered evidence is true. The effect of this evidence was to permit the Plaintiff to make Mr. Simon another Defendant.

III. THE TRIAL COURT ERRED WHEN IT PERMITTED EXPERT MEDICAL TESTIMONY REGARDING PLAINTIFF' CLAIMS OF EMOTIONAL DISTRESS ALTHOUGH THE PLAINTIFF'S EXPERT DID NOT ATTRIBUTE THE CAUSES OF THE EMOTIONAL DISTRESS TO THE DEFENDANTS' CONDUCT.

The Plaintiff offered the testimony of Dr. Philip Gelacek by deposition and Defendants objected by motion in limine and at trial. Dr. Gelacek testified that the stress suffered by the Plaintiff was attributable to accusations of theft. However, there was no evidence offered at trial that any of the named Defendants or any agent of the Defendants accused the Plaintiff of theft. Moreover the Plaintiff did not identify to Dr. Gelacek any individual who had accused her of theft. At a minimum, there must be some factual nexus between the expert's testimony regarding the Plaintiff's condition and conduct by the Defendants. In the instant matter, Dr. Gelacek testified that he first diagnosed depression on October 21, 1994. The conduct of the Defendants did not include accusations of theft and therefore it

was error to admit Dr. Gelacek's testimony.

This error by the District Court was particularly significant because the jury verdict did not distinguish between back pay, front pay and compensatory damages for emotional distress. However, the amount of damages awarded, Four Hundred Twenty Five ($425,000.00) Dollars, exceeded the Plaintiff's expert's calculation of back pack and front pay. Therefore the difference must be attributable to emotional distress. However, the Plaintiff's expert's testimony did not associate any emotional distress with conduct of the Defendants but the jury was permitted to conclude that if they believed the expert, the distress he testified to which he said had been suffered by the Plaintiff was attributable to the Defendants.

Dr. Gelacek testified that the Plaintiff reported her suspension and alleged accusations of theft on October 21, 1994. Given the distance in time from the suspension of August 19, 1993, and the lack of any conduct by the Defendants to cause the stress suffered by the Plaintiff, the Trial Court Judge should not have permitted Dr. Gelacek's testimony to be read to the jury.

IV. THE TRIAL COURT DENIED DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S CLAIMS UNDER TITLE VII AND THE PENNSYLVANIA HUMAN RELATIONS ACT EVEN THOUGH THE PLAINTIFF DID NOT FILE A COMPLAINT WITH THE PENNSYLVANIA HUMAN RELATIONS COMMISSION WITHIN 180 DAYS OF HER SUSPENSION AND DID NOT FILE A COMPLAINT WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION WITHIN EITHER 180 OR 300 DAYS.

The Plaintiff was suspended on August 19, 1993 but did not file any charge of discrimination with Equal Employment Opportunity Commission until October 17, 1994, more than one year after her suspension. She had not filed any earlier claim with the Pennsylvania Human Relations Commission within the 180 days required for a Complainant to file such Complaint with the Commission 43 P.S. § 959(h) and therefore the initial filing of October 17, 1994 was not

a timely charge because it was beyond the time permitted by Title VII for filing with the EEOC.

The Third Circuit and the Trial Court determined that there had been a reasonable basis for the Complainant to wait to file a charge and therefore permitted the statute to toll until she filed on October 17, 1994. However neither the Circuit nor the District identified actions by the Defendants which the Plaintiff specifically relied upon, but only postulated that the Plaintiff might have been misled by an initial suspension, even though the Plaintiff testified that on the day of her suspension she felt that discrimination had occurred. Absent such identified actions by the Defendant that the Plaintiff relied upon, there should be no basis for tolling the limitations when no conduct on part of the employer prevents an employee from asserting rights. The Plaintiff did not produce any evidence at trial of any action of the Defendants which caused her to wait to file her EEOC charge. Indeed she testified that she believed on August 19, 1993, the day of her suspension, that she suffered discrimination.

Equitable Tolling may be appropriate when the Defendant has actively mislead the Plaintiff, or the Plaintiff in some extraordinary way has been prevented from asserting rights, or the Plaintiff filed in the wrong forum but within the limitation period *Zipes v. Trans World Airlines, Inc.* 455 U.S. 385 71L.Ed 2d 234 102 S.Ct.1127 1982). In particular, Plaintiff who has counsel should not be permitted to toll the applicable statute.

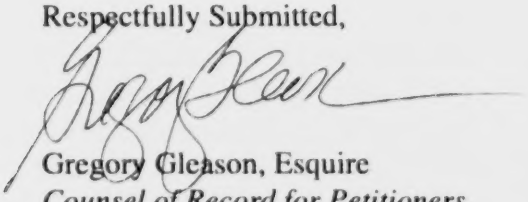
The Plaintiff did file a retaliation claim with the EEOC. However, this charge filed on December 16, 1994 is a charge of retaliation. The filing of a timely charge with the EEOC is a jurisdictional pre-requisite to a judicial Complaint. The December 16, 1994 charge could not have encompassed the August 19, 1993 suspension and therefore any investigation of the December 16, 1994 retaliation charge must fail because there was no timely filed charge with which to associate the retaliation charge. Therefore, the District Court erred when it did not grant the Defendants' Motion Pursuant to Rule 50 of the Federal Rules of Civil Procedure to dismiss the Plaintiff's claims under Title VII and the P.H.R.A. The affirmace by the Third Circuit conflicts with the Tenth Circuit in *Jones v. Runyon* 91 F.3d 1398

(10th Cir. 1996) (cert. denied, ___U.S.___, 137 L.Ed2d 326, 117 S.Ct. 1243 1997) which holds that a court may only hear a claim of retaliation when the main charge is timely.

CONCLUSION

For all the foregoing reasons, Petitioners request this Honorable Court to grant certioari to review these important issues and reverse the Third Cicuit and vacate the judgment of the Court below or remand this case for a new trial or other further proceedings as deemed appropriate.

Respectfully Submitted,



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UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-3147 & 98-3183

JANICE M. CLARK

v.

COUNTY OF ARMSTRONG; JACK DUNMIRE;
ROBERT A. CINPINSKI; JAMES SCAHILL, individually
and as COMMISSIONERS OF THE BOARD OF
COMMISSIONERS OF COUNTY OF ARMSTRONG;
BOARD OF COMMISSIONERS OF COUNTY OF
ARMSTRONG

COUNTY OF ARMSTRONG,
JACK DUNMIRE; JAMES SCAHILL
and ROBERT CINPINSKI,
Appellants at No. 98-3147

JANICE M. CLARK,
Appellant at No. 98-3183

On Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Civil Action No. 95-cv-01321
(Honorable Donetta W. Ambrose)

Argued June 1, 1999

Before: SCIRICA and McKEE, *Circuit Judges*,
and SCHWARZER, *District Judge**

(Filed JULY 14, 1999)

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*The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

MEMORANDUM OPINION

SCIRICA, *Circuit Judge.*

Janice Clark sued Armstrong County, Pennsylvania and several individual defendants for employment discrimination and defendants now appeal a jury verdict in Clark's favor. Defendants raise several issues on appeal, including whether the District Court properly admitted evidence of the manner in which the County disciplined a male employee accused of sex discrimination. We will affirm.

I

As of 1992, plaintiff Janice Clark was Director of the Tax Claim, Tax Mapping, and Assessment Offices in Armstrong County.[1] She reported directly to the three-person Armstrong County Board of Commissioners and supervised a staff of 15 people. In January 1992, Jack Dunmire and James Scahill were elected to the Board of Commissioners, joining Robert Cinpinski, a member since 1988. After the election, the commissioners stopped returning Clark's calls, kept her waiting for meetings or canceled them, and did not answer her memos. Instead, they met with William Brueggeman, the Chief Assessor in the Tax Claim Office, who was supervised by Clark, giving him information about the Tax Claim Office. They also awarded Brueggeman a merit raise without Clark's input and denied her a raise without stating a reason. In response to a request by Clark, the board authorized her to hire a full-time clerk. She interviewed candidates and placed her selection on the board's agenda, but the board did not approve it or return her phone calls about the matter.

In August 1993, Clark learned that a taxpayer's property was scheduled for sale although the taxpayer had paid his taxes. On August 11, 1993, Clark informed Cinpinski of the incident and recommended an audit of the Tax Claim Office. At Cinpinski's request, Armstrong County Detective Homer Crytzer investigated, with Clark's cooperation. On August 17, 1993, Clark balanced the Tax Claim Office's lien certificate fund, containing money received when the office sold lien certificates and tax lists to taxpayers. Clark found that the fund was not balanced and that proper procedures had not

been followed. Clark wrote receipts for payments that had been received without receipts being issued, filed the carbon copies, and discarded the original copies, which would ordinarily have gone to the purchaser as a receipt. She also threw out duplicative Xerox copies of some receipts. The next day, Jeanne Anthony, a clerk in the office, told Crytzer that Clark had tampered with receipts in the lien certificate file. As we discuss *infra*, Anthony was later convicted of stealing tax payments. Her thefts had caused the improperly scheduled tax sale.

On August 19, 1993, Cinpinski, Dunmire, Crytzer, the Armstrong County district attorney, and others, in the presence of Clark's staff and the public, balanced the cash in her office, inventoried and removed the office safe, and removed filing cabinets containing office records. That afternoon, Clark was called to a meeting with Commissioners Dunmire and Cinpinski. Anthony's charges were described, but Clark was not told who had made them. Clark denied the charges and said that her accuser would be found to be the thief. Dunmire replied, "I don't think so." The commissioners told Clark she was suspended without pay until the investigation was complete. She was escorted to her office to retrieve her purse and then escorted from the building. Clark's suspension was reported to the press, but her name was not used.

Brueggeman was made acting director of the offices, replacing Clark, and Anthony was placed in charge of the Tax Claim Office and given a raise. A full-time clerk was hired, as originally requested by Clark, and a new position beneath the Director's was created. Anthony continued to steal money during Brueggeman's tenure, and there was also at least one more incident in which a taxpayer's property was listed for auction after she had paid her taxes. The County Controller reported other problems to the board in late October 1994 and possibly earlier.[2]

The investigation of the missing tax funds was turned over to the State Police, who arrested Anthony in late September 1994 for stealing tax payments. The thefts with which she was charged occurred while Clark was in charge of the office. Anthony's arrest was widely reported in the County. On October 3, 1994, Clark requested a deci-

sion regarding her employment status. On October 6, she attended a board meeting and repeated her request. The board replied that it would hold a hearing to determine her employment status. On October 17, 1994, Clark filed charges with the Equal Employment Opportunity Commission (EEOC) and the Pennsylvania Human Relations Commission (PHRC), alleging sex discrimination for failure to reinstate. On October 19, 1994, the board told Clark by letter that the hearing on her employment status would be held on October 25, 1994. Her attorney objected to the short notice and stated that Clark would not attend any hearing because the board was biased.

The board fired Clark at a public meeting on November 3, 1994. It did not publicly announce the reason for the termination, but sent Clark a letter saying she had been fired for "your failures to adequately supervise employees in your office, failure to adequately manage your office, improper maintenance of the Tax Lien Certificate Fund, your alleged destruction, alteration and falsification of records of the Tax Lien Certificate Fund, inaccurate and erroneous recordkeeping in your office and your failure to identify and correct these deficiencies." On December 16, 1994, Clark filed charges with the EEOC and PHRC alleging that she had been fired in retaliation for her earlier charges.

In August 1995, Anthony was charged with further thefts from the tax office. These thefts had occurred while Brueggeman was director. The charges were once again widely reported. Anthony was convicted of both sets of thefts in May 1996. Brueggeman remained in charge of the offices until June 1996, when he retired. In October 1996, Brueggeman's replacement resigned and Brueggeman was rehired as a consultant, working until the end of the calendar year. He was not disciplined for Anthony's thefts.

II

On August 17, 1995, Clark sued the County, the Board of Commissioners, and the three commissioners. She brought claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994) (charging that her termination was discriminatory on the basis of sex and retaliatory); 42 U.S.C.A. § 1983 (West

1984) (charging violations of her right to equal protection and deprivation of liberty without due process); and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951-63 (West 1991 & Supp. 1998) (charging sex discrimination and retaliation). The due process claim was dismissed at summary judgment. A jury trial was held on the remaining claims.

At trial, Clark presented evidence regarding G. Paul Simon, the former Director of the County's Emergency Management Agency. A female County employee accused Simon of sexual harassment and then complained that Simon was contacting her and driving past her office and her house. Simon was told by the board to stay away from the woman but Scahill saw him driving past her office and others reported that he had been contacting her. A written reprimand was prepared but not given to Simon because he suffered a stroke in June 1992. As a result of his stroke, Simon was out of the office for several weeks, during which time Scahill was acting director of the County EMA. While acting as director, Scahill discovered inadequacies in the management of EMA. During an argument over Simon's compensation, Simon told Dunmire that Dunmire didn't deserve to be on the face of the earth, which Dunmire understood as a threat. In February 1994, Parker City government officials complained to Scahill about EMA's handling of an ice jam. Scahill ordered Simon not to attend a meeting of the Parker City Council at which local officials were to discuss the ice jam. Simon attended anyway, an act Scahill characterized to the other commissioners as "gross insubordination." Simon resigned after being told that if he did not do so he would be fired. The board did not publicize Simon's resignation.

The jury found that the County and each of the three commissioners had "discriminate[d] against...Clark, based on her sex or in retaliation for making a complaint of sex discrimination[.]" It awarded $425,000 compensatory damages and $25,000 punitive damages against each individual defendant. Defendants appeal from the verdict and Clark cross-appeals from the dismissal of her due process claim.[3]

III

Defendants contend the introduction of the evidence regarding the County's treatment of Simon violated Federal Rule of Evidence 403.[4] Ordinarily, we review Rule 403 decisions for abuse of discretion, mindful that "[i]f judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *United States v. Long*, 574 F.2d 761, 767 (3d Cir. 1978). But defendants argue that the District Court failed to articulate on the record a balance between the probative value of the Simon evidence and its prejudicial effect. If the trial court fails to balance probative value against prejudice on the record in response to a Rule 403 objection, "either we decide the trial court implicitly performed the required balance; or, if we decide the trial court did not, we undertake to perform the balance ourself." *United States v. Eufrasio*, 935 F.2d 553, 572 (3d Cir. 1991). Failure to articulate a Rule 403 balancing is not reversible error per se, *see id.*, but results in de novo review.

The Rule 403 objection by defendants' counsel, Gregory Gleason, and the court's reply were as follows:

> MR. GLEASON:...[I]t will appear as if these accusations ought to be accepted as true even though Mr. Simon always denied them...
>
> THE COURT: I can make it clear to the jury that it doesn't matter whether he did it or not. The issue has nothing to do with whether or not the sexual harassment occurred. I really think the jury is brighter than that. I think most people would be.
>
> ...
>
> THE COURT: How is it prejudicial to the Defendants if Mr. Simon sexually harassed a woman? How does that prejudice one of the Defendants?
>
> ...

MR. GLEASON: Because it appears they have tolerated sexual harassment. It appears they have ignored it when, in fact, they didn't ignore it; and, in fact, the person who was accused of it, denied it. Now they're in the situation where they've got to decide what to do with an accusation that has been denied by Mr. Simon.
It appears, if the jury hears this, at least I think it will appear that, in fact, these accusations are true...

THE COURT: How does that differ from Miss Clark denying any accusations–denying any accusations against her? The jury has heard a whole lot of that.

MR. GLEASON: The jury hasn't heard accusations made by the Defendants. They never accused Miss Clark of taking monies.

THE COURT:...It is totally irrelevant. We're not trying a sexual harassment charge, and not bringing Mr. Simon in for that...

...

THE COURT:...They're just saying when faced with accusations, when faced with allegations, how do people respond? Do they respond differently if it's a woman from the way they respond if it's a man?...

This exchange reflects the court's balancing, whether explicit or implicit, of the probative value of the Simon evidence against its prejudicial effect. The District Court explained that the evidence was probative because both Simon and Clark had been accused of wrongdoing and had denied the accusations, allowing the jury to compare the treatment of a male with a female employee in such a situation. The court also indicated that it did not believe the evidence would be prejudicial because it believed the jury would understand that the truth of the accusations against Simon was irrelevant. Because the court properly explained its reasoning on the record, we review the admission of the evidence for abuse of discretion.

Defendants contend the treatment of Simon was not probative

because the facts of his case were different from Clark's. Defendants point out Simon supervised a smaller department than Clark; the problems associated with Clark's office caused the County to lose thousands of dollars and could have caused illegal tax auctions, whereas Simon was accused of sexual harassment and insubordination; and Simon had suffered a stroke. Although these are important distinctions to point out to a jury, we agree with the District Court that the evidence about Simon retained probative value. Both Clark and Simon were supervisors who reported directly to the board and were ultimately forced to leave their jobs following allegations of misconduct. A comparison of defendants' treatment of Clark, a woman, and Simon, a man, could therefore have helped the jury understand defendants' motives for terminating Clark.

Defendants also argue that the Simon evidence was "extremely prejudicial" and could have caused the jury to punish the defendants regardless of their treatment of Clark. We rejected a similar argument in *Glass v. Philadelphia Electric Co.*, 34 F.3d 188 (3d Cir. 1994). Glass alleged that his employer had racially discriminated against him by denying him promotions. To explain the denied promotions, the employer noted an unfavorable performance evaluation Glass had received. Glass sought to introduce testimony that his co-workers were racially harassing him at the time the evaluation was given, affecting his job performance. We held the trial court had abused its discretion under Rule 403 by refusing to admit the evidence. "'Circumstantial proof of discrimination[,]'" we explained,

> "typically includes unflattering testimony about the employer's history and work practices evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive."

34 F.3d at 195 (quoting *Estes v. Dick Smith Ford. Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988)). Similarly, the Simon evidence, although potentially unflattering, may have helped the jury assess the defendants' motives. Furthermore, the distinctions between *Glass* and this

case support Clark. In *Glass* the evidence was probative only if true—i.e., only if Glass really was harassed, thus affecting his job performance—whereas here the court properly instructed the jury that the truth of the harassment allegations against Simon was irrelevant.[5] And in *Glass* we overturned a district court's exclusion of the evidence despite the highly deferential standard of review accorded Rule 403 decisions. We see no error here.[6]

IV

Defendants contend the District Court erred in denying their Rule 50 motion for judgment as a matter of law, in which they argued that Clark's Title VII and PHRA claims were barred because she did not properly file EEOC and PHRC complaints; that Clark's section 1983 claim should have been dismissed because she presented insufficient evidence of discriminatory intent; that the evidence was insufficient to support the imposition of punitive damages by the jury under section 1983; and that the individual defendants had absolute legislative immunity from section 1983 liability. But defendants have not preserved these issues for appeal. The denial of a motion for judgment as a matter of law can be appealed only if the motion is made at the close of all the evidence and then renewed after an unfavorable verdict. *See Greenleaf v. Garlock, Inc.*, 174 F.3d 352, __ 1999 WL 240051, at *10 (3d Cir. 1999); *Yohannon v. Keene Corp.*, 924 F.2d 1255, 1262-63 (3d Cir. 1991); *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 10-12 (3d Cir. 1976). Defendants moved for judgment as a matter of law at the close of Clark's case and renewed their motion following the jury's verdict but did not move for judgment as a matter of law at the close of all the evidence. Therefore, we cannot consider their appeal.

Furthermore, we would affirm the District Court's denial of the motion if it were properly before us.[7] We review the denial of a motion for judgment as a matter of law de novo. *See Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1167 (3d Cir. 1993). We affirm unless the evidence does not afford any rational basis for the verdict, drawing all justifiable inferences in favor of the non-moving party. *See id.*

A

Timely filing of an EEOC complaint is a statutory prerequisite to a Title VII suit.[8] *See* 42 U.S.C.A. § 2000e-5(f)(1); *Waiters v. Parsons,* 729 F.2d 233, 237 (3d Cir. 1984). Generally, a plaintiff has 180 days from the accrual of her cause of action to file an EEOC complaint, but a plaintiff who files a charge of employment discrimination with the PHRC (whether timely or untimely) has 300 days to file her EEOC complaint. *See* 42 U.S.C.A. § 2000e-5(e)(1); *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1385 (3d Cir. 1994). The cause of action accrues when the plaintiff knows or should know she has been injured, not when she learns of the discrimination. *See Oshiver,* 38 F.3d at 1386-87, 1391. As noted, Clark was suspended August 19, 1993 and filed an EEOC complaint for discriminatory failure to reinstate on October 17, 1994, more than 300 days after the suspension. She never filed a complaint charging that her termination (as opposed her suspension) had been discriminatory.[9]

Because the section 2000e-5 time limit is a statute of limitations, not a jurisdictional prerequisite to suit, it may be tolled in appropriate circumstances. *See Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982); *Oshiver,* 38 F.3d at 1387. In particular, tolling is appropriate "where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." *Miller v. Beneficial Management Corp.,* 977 F.2d 834, 845 (3d Cir. 1992) (internal quotation marks omitted). Clark was told that her suspension, a preliminary employment decision, was effective until the completion of the board's investigation. She could reasonably have understood that, if the investigation cleared her of wrongdoing, she would be reinstated. She requested reinstatement on October 3, 1994, shortly after Anthony was arrested, and filed her EEOC charge within two weeks. We note that "the contention that only egregious acts of active deception can toll the [Title VII] limitation period has no support in the law." *Miller,* 977 F.2d at 845 (internal quotation marks omitted).

Defendants point out that on cross-examination, Clark agreed that "as of August 19, 1993 [the date of Clark's suspension], you

believe [sic] you had been discriminated against." But an employer's misleading behavior can toll the statute of limitations in appropriate circumstances whether or not the employee suspects discrimination. In *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303 (3d Cir. 1983), Meyer believed he might have been fired because of his age but, when he asked, Riegel replied he had been dismissed as part of a reorganization in his department. We held that the employer's representation was sufficient to toll the statute of limitations. *See id.* at 307-08.[10]

B

On appeal, defendants claim that Clark did not present sufficient evidence to justify the jury's finding of liability or award of punitive damages under section 1983.[11] "The jury's verdict may not be disturbed unless the record is critically devoid of the minimal amount of evidence upon which the jury could have reached its verdict." *Feldman v. Philadelphia Hous. Auth.*, 43 F.3d 823, 833 (3d Cir. 1994). Our review is plenary. *See id.* at 828.

A section 1983 employment discrimination claim requires proof of "purposeful discrimination." *Batson v. Kentucky*, 476 U.S. 79, 93 (1986). The plaintiff can meet this burden by demonstrating that she was treated differently from others similarly situated. *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990). We agree with the District Court that Clark met this standard: the jury could have concluded that the defendants did not penalize Brueggeman or Simon as heavily for equally serious allegations of misconduct.[12]

Punitive damages are permissible "'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" *Feldman*, 43 F.3d at 833 (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). The jury could have found that defendants deliberately acted in a manner that suggested Clark had performed her job incompetently and had stolen money from the County. The board suspended her shortly after she reported missing tax funds and immediately after informing her of allegations that she had falsified records in the tax lien fund. She was then escorted from the building and not permitted to retrieve her personal belongings. In *Abraham v.*

Pekarski, 728 F.2d 167 (3d Cir. 1984), we upheld a jury award of punitive damages in an employment discrimination case based in part on the fact the employee had been terminated without notice, effective immediately, and in the middle of a pay period, circumstances that suggested wrongdoing. *See id.* at 173. Similarly, in *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988), the court upheld a jury award of punitive damages after a finding of employment discrimination in the denial of tenure to a female university professor. The court explained that the propriety of punitive damages "is a matter well within the province of the jury, as it requires the type of moral judgment that lay persons make every day." *Id.* at 1329.[13]

V

We have reviewed Clark's cross-appeal of the dismissal of her due process claim and find her appeal to be without merit.

VI

For the reasons given, we will affirm the judgment.
TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

DATED:

---

[1] Our recitation of the facts is based on the evidence presented at trial, viewed in the light most favorable to Clark.

[2] According to the District Court,

> When serving as Acting Director, Brueggeman committed many errors, none of which he was disciplined for in any manner. These errors were that he offered some delinquent taxpayers agreements without any money being put down by the taxpayers, he failed to attach all correct documents to

> petitions for tax sale and he did not charge mailing costs for approximately 4,500 pieces of certified mail. Additionally, while Brueggeman was Acting Director, there was money not receipted, money missing and money unaccounted for in the Tax Claim office.

Clark v. County of Armstrong, No. 95-CV-1321, slip op. at 6-7 (W.D. Pa. May 2, 1997) (granting in part and denying in part defendants' motion for summary judgment).

[3] The District Court had federal-question subject matter jurisdiction. *See* 28 U.S.C.A. § 1331 (West 1993). We have jurisdiction over the final judgment. *See* 28 U.S.C.A. § 1291 (West 1993).

[4] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." Fed. R. Evid. 403.

[5] After Clark's counsel began to cross-examine Commissioner Cinpinski regarding "problems wherein Mr. Simon was accused of sexually harassing his former secretary," the court stated to the jury,

> [A]s to the truth of the allegations, those are not at issue.
>
> What is at issue here is the Plaintiff's contention that Mr. Simon's situation was somehow handled differently from Clark's, then that will be up to you to determine, whether or not it was; and that's the only reason it's being offered here...

In addition to their Rule 403 argument, defendants object to this instruction, asserting, "[T]he admission of evidence labeled by the Trial Judge as admissible but of no moment whether or not true creates exactly the kind of unfair prejudice which...ought to be excluded. How can the Defendants counter evidence which does not have to be true, accurate, credible or reliable?" But the court stated that the truth of the allegations of sexual harassment, about which Commissioner Cinpinski had just been asked, was not at issue. The jury was not told that the truth of the testimony regarding defendants' responses to the allegations was irrelevant.

[6] Defendants also argue that the District Court should not have admitted the testimony of Clark's family physician, Dr. Philip Galacek, who diagnosed Clark as depressed following her suspension. Dr. Galacek testified Clark told him she had been accused of theft. He further testified that, in his opinion, her depression was caused by "[t]he duress that she had alluded to as far as having been accused of stealing money and the ordeal that she had subsequently been subjected to."

Defendants argue Dr. Galacek's testimony was irrelevant because there was no testimony that any defendant accused Clark of theft. But the jury could have concluded that Clark reasonably interpreted the circumstances of her suspension as an accusation of theft. Furthermore, even assuming Clark was referring to Anthony's (or someone else's) accusation of theft, Dr. Galacek's testimony that Clark was depressed after her suspension, in part because of the ordeal she had suffered, remains probative of the emotional effects of defendants' actions. Defendants have not explained how the prejudicial effects of Dr. Galacek's testimony substantially outweighed this probative value.

[7] Most of the arguments in their Rule 50 motion were also made in defendants' motion for summary judgment. Defendants have not appealed the District Court's partial denial of that motion. Had they done so, we would have affirmed the trial court for the same reasons we would have affirmed its denial of the Rule 50 motion.

[8] Defendants also maintain Clark waived her PHRA claim by failing to file a timely PHRC complaint. We reject this argument for the same reason we reject defendants' challenge to Clark's Title VII claims. Furthermore, Title VII would be sufficient to justify the jury verdicts without reference to PHRA.

[9] Clark did file an EEOC complaint alleging retaliatory termination. Defendants assert that this complaint was inadequate because the sex discrimination complaint, allegedly the basis of the retaliation, was untimely. In light of our determination that Clark's sex discrimination complaint was timely, we need not consider this argument.

[10] Although Meyer's suit was brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621-34 (West 1999), we held in *Oshiver* that the same analysis was applicable to Title VII cases. *See* 38 F.3d at 1385 n.4, 1388.

[11] In their motion for judgment as a matter of law, defendants also argued there was insufficient evidence to support the finding of liability or punitive damage award under Title VII and PHRA, but they have not advanced these arguments on appeal. Therefore, we would affirm whether or not we accepted defendants' challenge to the section 1983 claims.

[12] Defendants emphasize that Brueggeman's misconduct was not reported to them before his retirement. But the jury may have believed defendants were aware of Anthony's arrest and conviction and the nature of the charges against her. In any event, defendants' treatment of Simon would be enough to sustain the jury imposition of liability.

[13] We have also reviewed defendants' appeal of the District Court's rejection of their claim of legislative immunity from § 1983 suit. We find their position to be without merit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-3147 & 98-3183

JANICE M. CLARK

v.

COUNTY OF ARMSTRONG; JACK DUNMIRE;
ROBERT A. CINPINSKI; JAMES SCAHILL, individually
and as COMMISSIONERS OF THE BOARD OF
COMMISSIONERS OF COUNTY OF ARMSTRONG;
BOARD OF COMMISSIONERS OF COUNTY
OF ARMSTRONG

COUNTY OF ARMSTRONG, JACK DUNMIRE;
JAMES SCAHILL and ROBERT CINPINSKI,
Appellants at No. 98-3147

JANICE M. CLARK,
Appellant at No. 98-3183

(D.C. Civ. No. 95-cv-01321)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge,* SLOVITER, MANSMANN,
GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE and RENDELL, *Circuit Judges,* and
SCHWARZER*, *District Judge*

---

*The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, who sat by designation, as to panel rehearing only.

The petition for rehearing filed by appellants/cross-appellees, County of Armstrong, Jack Dunmire, James Scahill and Robert Cinpinski, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT

Circuit Judge

Dated: AUG. 12, 1999

Supreme Court, U.S.
FILED
OCT 10 1999
OFFICE OF THE CLERK

No. 99-821

In The
Supreme Court of the United States

October Term, 1999

COUNTY OF ARMSTRONG, JACK DUNMIRE, ROBERT A. CINPINSKI AND JAMES SCAHILL, INDIVIDUALLY AND AS COMMISSIONERS ON THE BOARD OF COMMISSIONERS OF THE COUNTY OF ARMSTRONG,

Petitioners

vs.

JANICE M. CLARK,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Petitioners, County of Armstrong, Jack Dunmire, Robert A. Cinpinski and James Scahill, individually and as Commissioners on the Board of Commissioners of the County of Armstrong (hereinafter "County of Armstrong"), have petitioned the Court seeking a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit. In a memorandum opinion, the Court of Appeals held that the petitioners waived the issues raised by their Rule 50 motion for judgment as a matter of law in which the petitioners argued that the respondent's Title VII and PHRA claims were barred because she did not properly file EEOC and PHRC complaints; that petitioner's Section 1983 claim should have been dismissed because she presented insufficient evidence of discriminatory intent; that the evidence was insufficient to support the imposition of punitive damages by the jury under Section 1983; and that the individual defendants had absolute legislative immunity from Section 1983 liability. The United States Court of Appeals for the Third Circuit held that the petitioners did not preserve these issues for appeal. The United States Court of Appeals for the Third Circuit also held that the petitioner's motion in limine and petitioner's objections at trial pursuant to Rule 403 were properly denied. Furthermore, the United States Court of Appeals for the Third Circuit also held that the introduction of plaintiff's medical expert and the medical expert's testimony regarding the

respondent's emotional distress were properly presented.

The petitioners are attempting to obtain a writ of certiorari on asserted discretionary rulings by the District Court and on claims of misapplication of a properly stated rule of law. The petitioners are not claiming that the United States Court of Appeals for the Third Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. The petitioners also are not claiming that a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of the United States Court of Appeals and the petitioners are not claiming that a state court or the United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Finally, the Third Circuit has designated their opinion in this matter as "unreported - not precedential." This case has absolutely no precedential value. *See* Chapter 5, IOP. 5.3, 5.4

(formerly 5.1.2), Internal Operating Procedures of the United States Court of Appeals for the Third Circuit.

In summary, a fair reading of the petitioners' Petition for Writ of Certiorari fails to meet the standard for the exercise of judicial discretion by this Court.

COUNTER-STATEMENT OF THE CASE

The United States Court of Appeals for the Third Circuit has accurately and succinctly set forth the counter-statement of the case. As a result, the facts set forth on page 3(a), 4(a), 5(a), and 6(a) are set forth herein.

In 1992, plaintiff Janice Clark was director of the Tax Claim, Tax Mapping and Assessment Offices in Armstrong County. She reported directly to the three person Armstrong County Board of Commissioners and supervised a staff of fifteen people. In January 1992, Jack Dunmire and James Scahill were elected to the Board of Commissioners, joining Robert Cinpinski, a member since 1988. After the election, the Commissioners stopped returning Clark's calls, kept her waiting for meetings or canceled them, and did not answer her memos. Instead, they met with William Brueggeman, the Chief Assessor in the tax claim office, who was supervised by Clark,

giving him information about the tax claim office. They also awarded Brueggeman a merit raise without Clark's input and denied her a raise without stating a reason. In response to a request by Clark, the Board authorized her to hire a full-time clerk. She interviewed candidates and placed her selection on the Board's agenda, but the Board did not approve it or return her phone calls about the matter.

In August 1993, Clark learned that a taxpayer's property was scheduled for sale, although the taxpayer had paid his taxes. On August 11, 1993, Clark informed Cinpinski of the incident and recommended an audit of the tax claim office. At Cinpinski's request, Armstrong County Detective Homer Crytzer investigated, with Clark's cooperation. On August 17, 1993, Clark balanced the tax claim office's lien certificate fund, containing money received when the office sold lien certificates and tax lists to taxpayers. Clark found that the fund was not balanced and that proper procedures had not been followed. Clark wrote receipts for payments that had been received without receipts being issued, filed the carbon copies, and discarded the original copies, which would ordinarily have gone to the purchaser as a receipt. She also threw out duplicative Xerox copies of some receipts. The next day, Jeanne Anthony, a clerk in the office, told Crytzer that Clark had tampered with receipts in the lien certificate file. The same Jeanne Anthony was later convicted of stealing tax payments. Jeanne Anthony's thefts had caused the improperly scheduled tax sale referred to

above.

On August 19, 1993, Cinpinski, Dunmire, Crytzer and Armstrong County District Attorney and others, in the presence of Clark's staff and the public, balanced the cash in her office, inventoried and removed the office safe, and removed filing cabinets containing office records. That afternoon, Clark was called to a meeting with Commissioners Dunmire and Cinpinski. Anthony's charges were described, but Clark was not told who had made them. Clark denied the charges and said that her accuser would be found to be the thief. Dunmire replied, "I don't think so." The Commissioners told Clark she was suspended without pay until the investigation was complete. She was escorted to her office to retrieve her purse and then escorted from the building. Clark's suspension was reported to the Press, but her name was not used. Following her suspension Clark's family physician diagnosed Clark as depressed. He testified that in his opinion, her depression was caused by "the duress that she had alluded to as far as having been accused of stealing money and the ordeal that she had subsequently been subjected to."

Brueggeman was acting director of the offices, replacing Clark, and Anthony was placed in charge of the tax claim office and given a raise. A full-time clerk was hired, as originally requested by Clark, and a new position beneath the directors was created. Anthony continued to steal money during

Brueggeman's tenure, and there was also at least one more incident in which a taxpayer's property was listed for auction after she had paid her taxes.

The investigation of the missing tax funds was turned over to the State Police, who arrested Anthony in late September, 1994 for stealing tax payments. The theft with which she was charged occurred while Clark was in charge of the office. Anthony's arrest was widely reported in the County. On October 3, 1994, Clark requested a decision regarding her employment status. On October 6, 1994, she attended a Board meeting and repeated her request. The Board replied that it would hold a hearing to determine her employment status. On October 17, 1994, Clark filed charges with the Equal Employment Opportunity Commission (EEOC) and the Pennsylvania Human Relations Commission (PHRC), alleging sex discrimination for failure to reinstate. On October 19, 1994, the Board told Clark by letter that the hearing on her employment status would be held on October 25, 1994. Clark's attorney objected to the short notice and stated that Clark would not attend any hearing because the Board was biased.

The Board fired Clark at a public meeting on November 3, 1994. It did not publicly announce the reason for the termination, but sent Clark a letter saying she had been fired for "your failure to adequately supervise employees in your office, failure to adequately manage your office, improper maintenance

of the tax lien certificate fund, your alleged destruction, alteration and falsification of records of the tax lien certificate fund, inaccurate and erroneous record keeping in your office and your failure to identify and correct these deficiencies." On December 16, 1994, Clark filed charges with the EEOC and PHRC, alleging that she had been fired in retaliation for earlier charges.

In August 1995, Anthony was charged with further thefts from the tax office. These thefts had occurred while Brueggeman was director. The charges were once again widely reported. Anthony was convicted of both sets of thefts in May 1996. Brueggeman remained in charge of the offices until June 1996, when he retired. In October 1996, Brueggeman's replacement resigned and Brueggeman was rehired as a consultant, working until the end of the calendar year. He was not disciplined for Anthony's thefts.

On August 17, 1995, Clark sued the County, the Board of Commissioners and the three commissioners. She brought claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A., Subsections 2000(e) to 2000(e)-17 (West 1994) (charging that her termination was discriminatory on the basis of sex and retaliatory); 42 U.S.C.A. §1983 (West 1984) (charging violations of her right to equal protection and deprivation of liberty without due process); and the Pennsylvania Human Relations Act, 43 Pa. C.S.A. Subsections

951-63 (West 1991 and supp. 1998) (charging sex discrimination and retaliation). The due process claim was dismissed at summary judgment. A jury trial was held on the remaining claims.

At trial, Clark presented evidence regarding G. Paul Simon, the former director of the County's Emergency Management Agency. A female County employee accused Simon of sexual harassment and then complained that Simon was contacting her and driving past her office and her house. Simon was told by the Board to stay away from the woman, but Scahill saw him driving past her office and others reported that he had been contacting her. A written reprimand was prepared but not given to Simon because he suffered a stroke in June 1992. As a result of his stroke, Simon was out of the office for several weeks, during which time Scahill was acting director of the County EMA. While acting as director, Scahill discovered inadequacies in the management of the EMA. During an argument over Simon's compensation, Simon told Dunmire that Dunmire didn't deserve to be on the face of the earth, which Dunmire understood as a threat. In February 1994, Parker City government officials complained to Scahill about EMA's handling of an ice jam. Scahill ordered Simon not to attend a meeting of the Parker City Council, in which local officials were to discuss the ice jam. Simon attended anyway, an act Scahill characterized to the other commissioners as "gross insubordination." Simon resigned after being told that if he did

not do so, he would be fired. The Board did not publicize Simon's resignation.

The jury found that the County and each of three commissioners had "discriminated against . . . Clark based on her sex or in retaliation for making a complaint of sex discrimination." It awarded $425,000.00 compensatory damages and $25,000.00 punitive damages against each individual defendant. The defendants appealed to the United States Court of Appeals for the Third Circuit, which affirmed the jury's verdict and the rulings of the District Court. The defendants, who are now the petitioners, are seeking a Writ of Certiorari from this Court.

ARGUMENT

A. PETITIONER'S QUESTION I PRESENTED FOR REVIEW WAS WAIVED BY PETITIONER'S FAILURE TO PRESERVE THIS ISSUE FOR APPEAL.

The petitioners argue that the petitioner's Rule 50 motion to dismiss the individual defendants as to personal liability and liability for punitive damages should have been

granted by the District Court. However, the petitioners failed to preserve this issue for appeal. On page 10(a) of the Court of Appeals' opinion, the Court of Appeals states: "But defendants have not preserved these issues for appeal." The denial of a motion for judgment as a matter of law can be appealed only if the motion is made at the close of all evidence and then renewed after an unfavorable verdict. See Greenleaf v. Garlock, Inc., 174 F.3d 352, 364 (3rd Cir. 1999); Yohannon v. Keene Corporation, 924 F.2d 1255, 1262-63 (3rd Cir. 1991); Lowenstein v. Pepsi Cola Bottling Company, 536 F.2d 9, 10-12 (3rd Cir. 1976). The failure of petitioners to move at the close of all evidence is most serious. To ask the court to enter a judgment, contrary to a general verdict of the jury, where no motion for a directed verdict has been interposed, is simply to ask the Court to reexamine the facts already tried by the jury, and this the Court may not do without violating the Seventh Amendment. Mutual Ben. Health & Accident Assn. vs. Thomas, 123 F.2d 353, 355 (8th Cir. 1941)

Additionally, the Rule 50 motion at the close of evidence still allows for a possible cure in proof and the ability to avoid a new trial. This helps avoid tactical victories at the expense of substantive issues. *See* 5A Moore's Rules Federal Practice 850.08 at 2358-59 (1975) as discussed in *Lowenstein, supra,* at 11, as well as numerous other cites therein.

While finding a waiver of claims, the United States Court of Appeals nevertheless analyzed the District Court's denial of the Rule 50 motion and found that they would affirm the District Court's denial of the motion if the petitioners' motion had been properly before the United States Court of Appeals. As a result, this issue has been adequately addressed and decided by the United States Court of Appeals for the Third Circuit.

B. PETITIONERS WERE NOT UNFAIRLY PREJUDICED WHEN THE DISTRICT COURT DENIED PETITIONERS' MOTION IN LIMINE AND OVERRULED PETITIONERS' OBJECTIONS AT TRIAL PURSUANT TO RULE 403.

The United States Court of Appeals wrote an exhaustive analysis of the District Court's ruling on the petitioners' Federal Rule of Evidence 403 motion and the District Court's introduction of evidence regarding the petitioners' treatment of G. Paul Simon. The United States Court of Appeals' analysis is set forth on pages 7(a), 8(a), 9(a) and 10(a) of the Court of Appeals' opinion. Clearly, Rule 403 motions are reviewed to determine whether or not the District Court abused its discretion. United States v. Long, 574 F.2d 761, 767 (3rd Cir. 1978). The petitioners argued at the District Court level that the District Court failed to articulate on the record a balance

between the probative value of the Simon evidence and its prejudicial effect. The Court of Appeals pointed out that if a trial court fails to balance a probative value against prejudice on the record in response to a Rule 403 objection, then the Court of Appeals must decide whether the trial court implicitly performed the required balance or undertake to perform the balance itself. United States v. Eufrasio, 935, F.2d 553, 572 (3rd Cir. 1991). The failure to articulate a Rule 403 balancing is not reversible error per se, but results in a de novo review.

After an analysis of the record, the Court of Appeals found that the District Court did balance the probative value of the Simon evidence against its prejudicial effect. The District Court explained that the evidence was probative because both Simon and Clark had been accused of wrongdoing and had denied accusations, allowing the jury to compare the treatment of a male with a female employee in such a situation. The Court of Appeals concluded that the properly explained reasoning by the District Court on the record clearly showed that there was **no abuse of discretion**. *[emphasis added]*

The United States Court of Appeals further concluded that evidence of how petitioners treated Simon had probative value and may have helped the jury assess the petitioners' motives in this case. See Glass v. Philadelphia Electric Company, 34 F.3d 188 (3rd Cir. 1994). In summary, the petitioners were not unfairly prejudiced by the District Court's

overruling of the petitioners' motion in limine and the petitioners' Rule 403 motion.

C. THE DISTRICT COURT DID NOT COMMIT ERROR BY PERMITTING THE INTRODUCTION OF MEDICAL EXPERT EVIDENCE ON THE ISSUE OF EMOTIONAL DISTRESS.

At trial, the respondent introduced the testimony of the respondent's family physician, Dr. Philip Galacek, which the District Court admitted. Dr. Galacek diagnosed the respondent as depressed following her suspension. Dr. Galacek testified that Clark told him she had been accused of theft. He further opined that her depression was caused by "the duress that she had eluded to as far as having been accused of stealing money and the ordeal that she had subsequently been subjected to."

The United States Court of Appeals held that the testimony of Dr. Philip Galacek was probative of the emotional effects of the petitioners' actions. Furthermore, as the United States Court of Appeals pointed out, the petitioners never explained how the prejudicial effects of Dr. Philip Galacek's testimony substantially outweighed the probative value of Dr. Galacek's testimony. In summary, the United States Court of Appeals has carefully, adequately and correctly analyzed the issue regarding the introduction of the respondent's medical

expert and the medical expert's testimony.

D. THE ISSUE OF THE TIMELINESS OF FILING A CHARGE OF DISCRIMINATION WITH THE EEOC UNDER TITLE VII AND WITH THE PENNSYLVANIA HUMAN RELATIONS COMMISSION WAS WAIVED BY THE PETITIONERS.

Once again, the issue set forth in this argument by the petitioners was waived by the petitioners. As the United States Court of Appeals sets forth on page 10(a) of their opinion, the petitioners at trial were denied their Rule 50 motion for judgment as a matter of law in which they argued that Clark's Title VII and PHRA claim were barred because she did not properly file EEOC and PHRC complaints; that Clark's Section 1983 claim should have been dismissed because she presented insufficient evidence of discriminatory intent; that the evidence was insufficient to support the imposition of punitive damages by the jury under Section 1983; and that the individual defendants had absolute legislative immunity under Section 1983 liability. The United States Court of Appeals held that the petitioners did not preserve these issues for appeal. However, the United States Court of Appeals went on to analyze these issues as if the petitioners had preserved the issues for appeal. The analysis by the United States Court of Appeals appears in

its opinion on page 11(a) and 12(a). In summary, the United States Court of Appeals held that 42 U.S.C.A. Section 2000(e)-5(f) (1) is a statute of limitations, not a jurisdictional pre-requisite to suit. As a result, it may be tolled in appropriate circumstances. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) and Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 (3rd Cir. 1994) The Court of Appeals explained that tolling is appropriate "where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." See Miller v. Beneficial Management Corporation, 977 F.2d 834, 845 (3rd 1992).

In this case, the petitioners told Clark that her suspension, a preliminary employment decision, was effective until the completion of the Board's investigation. The respondent reasonably understood that, if the investigation cleared her of wrongdoing, she would be reinstated. The respondent requested reinstatement on October 3, 1994, shortly after the responsible party was arrested, and filed her EEOC charge within two weeks. As a result, the United States Court of Appeals held that the filing of the respondent's EEOC complaint and, by necessary implication, the filing of the PHRC complaint was timely.

CONCLUSION

For the reasons set forth above, respondent Janice M. Clark respectfully requests that the Court deny the Petition for Writ of Certiorari of the County of Armstrong, Jack Dunmire, Robert A. Cinpinski and James Scahill, individually and as Commissioners on the Board of Commissioners of the County of Armstrong.

Respectfully submitted,

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